

January 9. 1770.

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MEMORIAL

F O R

William Smith, only son and heir of the deceased
Dr Robert Smith of Forret, Pursuer,

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A G A I N S T

Mrs Elisabeth Moodie, relict of the said Dr Robert
Smith, his mother, Defender.

THE pursuer's situation in life is remarkably hard: His father, Dr Smith, died possessed of a very handsome fortune, partly heritable, partly moveable; he is his father's only child; and was but an infant when his father died, so that he could not possibly give him any just cause of offence; but being of an easy, indolent disposition, his wife got such an absolute ascendant over him, as is believed to be without example; and the use she made of that ascendant, is but too fatal a proof of Dr Smith's imprudence in throwing all into her hands.

He bought the estate of Forret, for which he paid about 52,000 merks Scots; and he purchased a house in the town of Montrose, at the price of 7000 merks: and took the rights of both conceived in favour of his wife in liferent; so that, while she lives, the pursuer cannot draw one penny out of those subjects.

Another, and still more extraordinary, effect of the lady's
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influence and ascendant, was her prevailing with the Doctor, to take most of the bonds for sums which he had occasion to lend out, simply and absolutely in her name; which, however industriously concealed, after the Doctor's death, discovery was made of these, to the amount of L. 1758 : 15 : 4 Sterling; and there is reason to believe, that she is possessed of other bonds to more than double the extent of those already discovered; all which she pretends to be her proper acquisitions since the Doctor's death. And, to crown the whole, she took from the Doctor, in 1751, a general disposition of the whole executry that should belong to him at his death, constituting and appointing her his sole executrix, and universal legatar; she also procured herself to be nominated tutrix and curatrix to the pursuer, her only child; by means of all which, the pursuer was left in a state of absolute dependence on her, and could not command a penny of money so long as she lived.

As the pursuer advanced in years, he was anxious to be put into some way of business, whether as a merchant or mechanic, that might enable him to do for himself; but his mother, without regard either to his inclinations or abilities, would have him a scholar, to qualify him for being of some learned profession; though it soon came to be discovered that he was quite unfit for it, nothing would satisfy, unless he was a scholar. And he did all he could to comply: but having no genius for any thing of the kind, he was at length obliged fairly to give it up, in hopes that his mother, before it was too late, would advance him a few hundred pounds, to account of his own fortune in her hands, and thereby be enabled to do something for himself; but any assistance of this kind was what she positively refused.

Even when he advanced to manhood, she kept him so poor in his cloaths, and so bare in money, that he was ashamed to be seen in any creditable company; and all he could gain from her was, an ungracious offer, that if he chose to reside
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in family with her, he should have his bed and board gratis, where he would have nothing to do, but to count his ten fingers, and the prime of his life pass over in that state of indolence and inactivity.

He employed their common friends to solicit a supply of one kind or another; either such an annual supply as might afford him an aliment, which by her marriage-contract she was bound to do, till he came of age; or if she rather chose, to give him a few hundred pounds, to enable him to enter into trade: but to all these she gave a *nolumus*.

Necessity knows no law; and therefore, however unwillingly, he was at length obliged to bring the present process; whereby, in the *first* place, he claims his legitim; *2dly*, an aliment; *3dly*, the price of a fir-wood, which she, in the character of tutrix, had sold and disposed of during his minority, and received the price.

Each of these articles were in effect so many different claims, independent of one another; for the pursuer all along declares, that he had but one object in view, *viz.* to obtain either a reasonable aliment, or a suitable supply of money to enable him to do for himself.

That branch of the process which respects the aliment is hitherto undetermined, and lies before your Lordships, it being an inner-house process; as it was contended, on the part of the lady, That no aliment should be finally decreed, till the other two branches of the process were brought forward; as whatever sums he should recover in these other branches of the cause, consideration behoved to be had thereof in modifying the aliment: and accordingly your Lordships have hitherto proceeded no further therein, than to modify an interim aliment; abundantly small, it must needs be confessed, but which he was willing, for peace sake, to accept of, till matters could be brought to a final conclusion.

That other branch of the cause, which respects the claim of legitim, met with great opposition, from an unwillingness
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to make discovery of the just amount of the Doctor's executy, whether standing in his own person at his death, or in the person of his widow; and in which the pursuer has been so far successful, as to force a discovery of bonds and other securities to the amount of L. 1758 : 15 : 4; upon which a question arose, Whether these should be considered as part of the Doctor's personal estate? but as that point, and consequently the pursuer's claim of legitim, as depending thereon, lies before your Lordships upon petition and answers, it would be improper to say more upon that head.

The *third* and *last* article claimed by the pursuer, was the price of a fir-wood, sold and disposed of by the defender during the pursuer's minority, at the agreed price of L. 261, 16s. Sterling, of which she appears to have received the payment in May 1762.

It was pleaded for the defender, That being conjunct fiar of the lands of Forret, she was intitled to cut such of the woods as were of an age proper to be cut; that this fir-wood was fully grown, and part of it seemingly upon the decay; and consequently, that as the cutting of this wood happened during the period of her liferent, she was intitled to the price; and ~~that~~ supposing she were to be made liable for the price, the same would be compensated by the aliment she had furnished to the pursuer, as well before as during the dependence of the process.

The Lord Ordinary, upon advising what was pleaded by both parties upon this point, gave judgement for the pursuer; and was, it is believed, disposed to have refused a representation against the same.

But upon a suggestion from the pursuer, that as the two other branches of the process lay before the whole Lords, there might seem to be some little connection between the two questions, and therefore that it would be more expedient that all the three points should be taken under consideration of the court at one and the same time, his Lordship made
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avifandum with this branch of the cause, and appointed parties to lodge their memorials: in obedience to which, this is humbly offered on the part of the pursuer.

And not to multiply words unnecessarily, he appeals to every lawyer who has wrote upon the subject, and to repeated decisions of this court, establishing this general proposition, That liferenters, whether by reservation, which is the highest species of liferent, or as conjunct fiars, which stand next in order, or simple liferenters, have no right to the woods growing upon the liferent-lands.

It has indeed been disputed, whether liferenters by reservation, or conjunct fiars, were not intitled to cut as much of the *silva cædua* as was necessary for the use of the liferent-lands. But no lawyer to the pursuer known, has said, that liferenters of any kind have any further right to the woods, than what is requisite for supporting the houses and other necessary uses of the liferent-lands; but that any liferenter should be intitled to cut planted timber, especially fir, which when once cut does not grow again, is a very new doctrine.

The liferenter by reservation, of all others approaches nearest to an absolute fiar; upon this principle, That when he disposes away the fee, under reservation of his own liferent, what he so reserves, is part of the fee or property that was formerly in him, which therefore falls to be most liberally construed: he may enter vassals, and has right to all the casualties of superiority that fall due during his incumbency.

But forcible as this liferent is in law understood to be in other particulars, yet, *quoad* the growing woods, it is never understood to go further, than to intitle the liferenter to the use of so much of the *silva cædua* as is necessary for the uses of the liferent-lands.

It has been made a question, whether, supposing a large wood to be divided in so many haggas as to afford an annual cutting of a hagg, and which to appearance will last so to all eternity, whether, in such case, the liferenter by reservation,

or conjunct fiar, might not be intitled to the cutting of these haggs, considered as the natural fruits of the ground: but whatever may be the judgement of the law in that case, as there can be no analogy between that and the present case, it is in vain to chase difficulties, or to argue abstract points which do not apply.

Lord Stair, lib. 2. tit. 6. § 11.—Lord Bankton, book 2. tit. 6. § 6.—and Mr Erskine, book 2. tit. 9. § 32. do all concur in establishing this general proposition, That simple liferenters have no right to woods of any kind; and that liferenters by reservation, or conjunct fiars, have only right to so much of the *silva cædua* as is necessary for the uses of the liferent-lands. And the same rule obtains with respect to coals: neither of them are properly *fructus*; and therefore they do not fall under the right of liferent. And if your Lordships take the trouble to cast an eye upon the Law-Dictionary, *voce* Liferenter, p. 548. and 549. you will find a variety of cases where it was so judged.

Amongst these, Harcass collects a decision in March 1683, Creditors of Muswell, against the Children, where “ it was found, That woods were not the property of a father who had disposed the fee of his lands to his son, reserving his liferent; and that the father had only liberty to cut so much as was needful for repairing of the houses; and could not dispose upon or sell any part, unless the wood was used formerly to be cut in yearly haggs.”

And in the case of Ferguson against Ferguson, so recent as December 1737, it was *in terminis* found, that a liferenter by reservation could cut such of the woods upon the estate as were of the nature of *silva cædua*, according to the custom and usage of the country where the woods grew.

This principle being established, it is a circumstance of no moment, whether this fir-wood had come to maturity or not. When it was cut, it was not *silva cædua*, or natural wood, which springs from the root as oft as it is cut; it was a parcel

cel of firs planted by the hand, which when once cut, could never grow again. So that in giving these to the liferenter, she would carry off the whole property of the subject. A liferenter's right can go no further than what is consistent with the nature of a liferent, viz. *salva rei substantia*; which can never apply to fir-woods, which confessedly do not spring from the root.

And to do the defender justice, she does not seem to entertain any sanguine hopes of prevailing in this plea; and therefore betakes herself to a separate independent point; whereby, upon supposition of the pursuer's being found intitled to the woods, she insists, that she ought to be allowed to apply the price thereof towards repayment of the aliment which she has furnished to the pursuer.

After all that the pursuer has experienced of his mother's severity, he is willing to hope, that this does not proceed from her, but from those who have the management of her affairs; as it is impossible to conceive, she could wish, or intend, to leave the pursuer, her only child, altogether destitute. But be that as it will, she can have no such claim during the years of the pursuer's minority; as by her contract of marriage, she is expressly taken bound to aliment the pursuer during his minority. And as to what he has received since he came of age, by orders of your Lordships, for his *interim* aliment, under which must be comprehended the expences he is necessarily put to in carrying on this litigation, your Lordships will not allow so ungracious a plea as to by-gones: and for the time to come, he is hopeful your Lordships will put him in a condition, in some shape or other, to do for himself; or decree him such an aliment, as is in some degree suitable to the fortune he must succeed to sooner or later; and to the affluent circumstances of his mother.

Some expences are said to have been incurred, in operating payment of the price of this wood from the purchasers; but as nothing is produced to verify the fact, it cannot be taken
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upon a bare averment : and there is strong evidence in process, that if any expences could be incurred, they must have been very inconsiderable ; for as the contract of sale of the wood bears date in December 1760, and the price payable at Whitsunday thereafter, it will not be denied that the price was actually paid within four days after it became due ; so that it must have been wanton to a degree, if any expences worthy of a name had been debursed in that time.

The pursuer has already said, That he is unwilling to disoblige his mother, by pressing any of these claims ; all that he demands, is a reasonable allowance for his subsistence, which he is willing to take in any shape : and as the Lord Ordinary took this point to report, with a view that the whole points, which stand now scattered and dispersed, might receive one judgement upon the whole, and which is believed to be the inducement for your Lordships delaying to give a settled aliment till the other branches of the cause should be brought forward ; now that the whole lies before your Lordships, it is hoped you will take them all under consideration at one and the same time, and give such judgement upon the whole as to you shall seem just.

In respect whereof, &c.

ALEX. LOCKHART.

